Filed 8/23/04 D'Amore v. Ritz-Carlton Hotel Co. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VICTOR S. D'AMORE, Plaintiff and Appellant, v. RITZ-CARLTON HOTEL COMPANY et al, Defendants and Respondents.	G032731 (Super. Ct. No. 01CC16169) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jack K. Mandel and Richard J. Beacom, Judges. (Retired judges of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Robert J. Wheeler for Plaintiff and Appellant.

Law Office of Kari M. Myron, Kari M. Myron; D'Antony, Poliquin & Doyle and Daniel W. Doyle for Defendant and Respondent Ritz-Carlton Hotel Company.

Law Offices of Marcus M. Baukol, James M. Fraser; Horvitz & Levy, David M. Axelrad and Kim L. Nguyen for Defendant and Respondent Drexel Heritage Furnishings, Inc.

* * *

Victor D'Amore sued the Ritz-Carlton Hotel (Ritz-Carlton) and Drexel Heritage Furnishings (Drexel) after sustaining an eye injury when he attempted to open an armoire drawer in his hotel room. A jury rejected D'Amore's negligence and premises liability claims against Ritz-Carlton and his products liability action against Drexel. On appeal, D'Amore challenges the substantial evidence to support the jury's special verdict and contends various evidentiary and instructional errors warrant reversal. For the reasons stated below, we affirm.

I

FACTS AND PROCEDURAL HISTORY

On December 22, 2000, D'Amore and his fiancée, Sophie Phommarine, checked into the Ritz-Carlton in San Francisco for a four-day stay. Situated along one wall of their hotel room was a large armoire manufactured by Drexel Heritage, measuring over six feet tall and approximately three feet wide. The upper half of the armoire contained a television, while the lower half appeared to be two columns of four drawers each. The left bank of drawers were fully functional, but what appeared to be an identical bank of four drawers along the right side was actually a single wooden "faux door," which opened to reveal a minibar. Both the real drawers and the faux door were made of the same wood, and the handles on all eight "drawers" were identical. Because the faux door was held shut by a roller catch mechanism, more force was required to open it than that necessary for each individual drawer.

Once in the room, Phommarine unpacked the couple's clothing into the drawers on the left side of the armoire. On Christmas, the couple returned to their hotel room after spending the day sightseeing. D'Amore saw a pair of pants on the bed that he wished to place in the armoire. Finding the drawers on the left side full, he bent down, grabbed the handle, and attempted to open what he thought was the bottom drawer on the right side. When he pulled the handle, the faux door opened and a knob on the outside of the door struck D'Amore in the right eye. He felt intense pain and saw a bright flash of

light. His eye socket was bruised both above and below the eye. D'Amore applied an ice compress to the injury, and the next day reported the incident to several hotel employees, including the hotel's security officer, before checking out.

D'Amore's vision began to deteriorate the day after the injury. He saw "floaters" in his field of vision, as well as a "sliver," which over the next three days grew progressively larger until 30 percent of his vision was obscured. After returning home, D'Amore consulted an ophthalmologist, who diagnosed his problem as a detached retina. An eye surgeon performed emergency surgery to reattach the retina. Though the operation was successful in saving D'Amore's sight, he continued to suffer distortion in his vision after the surgery. Before this incident, D'Amore had worked as a nuclear engineer for nearly 20 years. Because of physical and emotional problems, he was unable to return to work.

The armoire was one of 303 made exclusively for the Ritz-Carlton by Drexel 10 years before this incident. Neither Ritz-Carlton nor Drexel was aware of any earlier reports of injury resulting from the design of the armoire.

D'Amore brought suit against both Ritz-Carlton and Drexel, alleging general negligence, premises liability, and products liability. Judge Mandel presided over the first trial. During D'Amore's opening statement, the court reprimanded counsel several times for improper argument. Once counsel concluded his opening remarks, the court immediately declared a recess and held a hearing outside the presence of the jury. The court concluded D'Amore's counsel improperly argued his case during opening statement and declared a mistrial.

A second trial commenced before Judge Beacom. D'Amore testified he had not used the minibar during his stay at the hotel, and was unaware the lower right portion of the armoire was a faux door. He did not notice the lock on the cabinet, nor did he spot a paper seal the hotel placed on the faux door to inform the housekeeping staff to restock the minibar after it had been used by the hotel's guests. D'Amore identified both

a psychiatrist and a psychologist he had consulted to help him cope with emotional problems experienced after the injury. Ritz-Carlton and Drexel moved to strike this testimony because these experts had not been disclosed before trial. The court granted this motion, and admonished the jury to disregard D'Amore's testimony concerning his psychiatric treatment.

Later in the trial, the court held a hearing to consider whether D'Amore's "human factors"[1] expert, Dr. Richard Hornick, would be allowed to testify. The court concluded the testimony would not assist the jury because the issue of whether the armoire's design was confusing and dangerous was within the jurors' common experience. The court also found the testimony was cumulative.

Returning a special verdict, the jury found Ritz-Carlton was not negligent and Drexel did not defectively design the armoire. After the court polled the jury, the foreperson read the following prepared statement to the defendants: "We would recommend that they would render as nonfunctional the bottom three right handles on the faux door of the armoire. [¶] And secondly, if not already done so, [we] would recommend updating, slash, correcting the key jacket information [supplied to hotel guests upon check-in] with current [minibar] operation policy."

II

DISCUSSION

A. Mistrial

D'Amore claims the trial court erroneously declared a mistrial after the opening statement by his counsel, Silvio Natale. We find no grounds for the remedy D'Amore seeks, which is reversal of the jury verdict in the ensuing trial. Whether to

[1] D'Amore defines human factors as "the scientific study of how the capabilities and limitations of people shape the way they use products, machines, and systems in their environments."

grant or reject a motion for a mistrial is committed to the sound discretion of the trial court. (*People v. Hines* (1997) 15 Cal.4th 997, 1038; accord *Arizona v. Washington* (1978) 434 U.S. 497, 514.)

The court instructed the jury: "Ladies and gentlemen, you're about to experience opening statements. Despite what you see on television, this is not thunder and lightning. Argument is not permitted." The court further advised the jury that evidence would not be presented, but merely a summary of the evidence — a process the court compared to the "cover of a jig saw puzzle" rather than the evidentiary "pieces" themselves, which would be admitted during trial. When Natale made a reference early in his opening that D'Amore's injury occurred ". . . Christmas night of all nights," the court admonished him, "Counsel, a little less advocacy and a little more presentation." Thereafter, the court sustained three consecutive objections to Natale's remarks.

First, after spending more time on the qualifications of plaintiff's experts than his summary of their testimony, Natale commented that the defense expert who examined the armoire "only worked on the case and seen [*sic*] this unit maybe a week or so," and argued in the negative about what the expert "didn't testify . . . " to drawing a defense objection and a reprimand from the court that "[c]ounsel is arguing the case and that's not appropriate in opening statement." Second, after Natale used a "life size" representation of the armoire to reenact D'Amore's injury, the court became concerned his statement was treading into evidentiary presentation, rather than summary, and sustained an objection when he presented a model of the eye to the jury as evidence by stating, "I'm showing you, this is the inside of our eye. . . ."

Ritz-Carlton claims Natale used the displays in spite of a pretrial ruling prohibiting the use of demonstrative evidence during opening statements, but this ruling

is not in the appellate record. In any event, in sustaining the objection, the court reminded Natale, "This is also improper opening. Counsel knows better." The court sustained a third objection a short time later when Natale used the eye model to demonstrate "what they call macula off. Shallow macula off. It had come off sufficiently that the macula, this little dot here, had become detached, partially detached."

After Natale concluded his statement, the court called counsel into his chambers and declared, "I don't recall the last time I had to give three admonishments during opening statement based upon the abuse by counsel. [¶] During the opening statement, there were repetitions . . . . There were comments on experts[']credentials. [¶] And as I mentioned, there were at least the three areas of misconduct which led to the admonishment. [¶] . . . [¶] It leads me to a difficulty which I am going to solve right now. I'm inviting a motion for mistrial. If it's made — you gentlemen better think about it — it will be granted. . . . If it's not made, we've just cured the problem because you've chosen not to seek that relief." Taking the court's hint, defendants moved for a mistrial, which, not surprisingly, the court granted. D'Amore now contends this was error requiring reversal of the subsequent jury trial conducted five months later before Judge Beacom.[2]

We need not reach the merits of D'Amore's claim the court abused its discretion in granting the mistrial. Assuming an order granting a mistrial may be appealed with the judgment in the ensuing trial (see *Reimer v. Firpo* (1949) 94 Cal.App.2d 798, 802; but see *Heavy Duty Truck Leasing, Inc. v. Superior Court* (1970) 11 Cal.App.3d 116, 119 [issuing writ to overturn erroneous grant of mistrial,

[2] Judge Mandel did not rehear the case because he was no longer sitting by assignment when the case was retried.

without awaiting new trial motion after jury verdict]), there is no link between D'Amore's requested remedy and the prejudice he claims he suffered from the mistrial.

D'Amore complains he "lost the benefit of a newly empanelled jury who very well might have found in his favor and awarded him money damages for his devastating eye injury." But reversal of the second jury's verdict would not restore or somehow reconstitute the prior-empanelled jury, which was lost forever. Reversal would only secure for D'Amore the right to participate in selecting another jury, a remedy he received in the trial before Judge Beacom. Reversal, therefore, would be an empty gesture. Wishful speculation about a more favorable outcome with the first jury is not sufficient reason alone to invalidate or impugn a second jury's verdict; D'Amore is not entitled to a merry-go-round of juries until he achieves his desired outcome.

Similarly, his complaint that his attorney had to duplicate preparation for the second trial is no occasion for reversal, which would not restore those hours or assure compensation for them. In sum, the prejudice D'Amore claims he suffered as a result of the mistrial is not reversible prejudice; rather, the inconveniences, setbacks, and expenses incidental to a mistrial are known hazards that are irremediable in the circumstances presented here. Appellate courts do not engage in idle acts and, simply put, D'Amore presents no cognizable claim for redress. (*Consolidated, Inc. v. Northbrook Ins. Co.* (1979) 92 Cal.App.3d 888, 893 ["it is clear that the reversal of the judgment would serve no useful purpose and would simply constitute an idle act"]; see also *People v. Haskins* (1985) 171 Cal.App.3d 344, 350 ["The law does not require idle acts"].)

B. Exclusion of Dr. Hornick as an Expert Witness

D'Amore contends his "human factors" expert witness, Dr. Hornick, should have been allowed to testify. The expert's testimony, D'Amore claims, would have

informed the jury about "'certain human factor issues that would be related to the design of the piece of furniture involved as well as the behavior and expectancy of Mr. D'Amore.'" The trial court, however, found the human factors subject matter not "sufficiently beyond common experience that the opinion of an expert will assist the trier of fact." Rather, the court concluded, "I don't think it's going to be of help, just take up a lot of time, and I think it's confusing." After hearing D'Amore's testimony and that of his fiancée, the court added that Dr. Hornick's "proposed testimony was cumulative."

We review a trial court's exclusion of expert witness testimony for abuse of discretion. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) An expert witness's testimony may be excluded if it is not "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) The court also has the power to exclude expert testimony if it is cumulative, will waste time, create undue prejudice, confuse the issues, or mislead the jury. (*Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371; Evid. Code, § 352.)

The court could reasonably conclude Hornick's proposed testimony did not relate to a subject sufficiently beyond common experience. D'Amore himself characterizes Hornick's expertise as "look[ing] at the design of the armoire from the perspective of the end user of the product; that is, what are the user's expectations and limitations in using the product." But in a tort case it is emphatically the province of the jury to determine the expectations and limitations of the "reasonable Everyman" product user, and the court could reasonably decide the use of an armoire is not beyond the common experience of the average person. (See *Cohen v. Western Hotels, Inc.* (9th Cir. 1960) 276 F.2d 26, 27 [jurors could determine for themselves whether hotel room rug caused dangerous condition]; accord *Soule v. General Motors Corp.* (1994) 8 Cal.4th

548, 567 ["where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury's function . . ."].)

In Hornick's 30 years in the aerospace industry as a human factors specialist, he analyzed interior spacecraft design, cockpit design for high performance aircraft, and weapons systems and commissary equipment for two naval ships. But there was no evidence that zero gravity, G-force acceleration, roiling seas or other factors beyond the jury's common experience played a role in D'Amore's armoire injury. The court aptly quipped, "We're not trying to bring astronauts back from space here" and, on appeal, we have no basis for second-guessing the court's conclusion that "I don't think this is a matter beyond the competence of people of ordinary capabilities to evaluate." (Evid. Code, § 801, subd. (a).)

Similarly, regarding Hornick's proposed testimony on the individualized "'behavior and expectancy of Mr. D'Amore,'" the court could conclude without abusing its discretion that D'Amore and his fiancée were the best sources of this evidence. For this reason, the court did not err in excluding Hornick's testimony as cumulative, and potentially confusing or obfuscatory, of anything D'Amore and Phommarine had to say about their particular experience with the armoire. There was no error.

C. Defense Verdict on D'Amore's Failure to Warn Cause of Action

D'Amore artfully claims no substantial evidence supports the jury's special finding that Drexel gave warning of the armoire's defects. He complains Drexel "did not produce one iota of evidence that it, as the armoire's manufacturer, provided any type of warning to Appellant of the armoire's dangerous nature; that is, that a fake door was

hidden behind what appeared to be four functioning drawers in the armoire's lower right side." But D'Amore misconstrues the special verdict. The jury did not conclude that Drexel gave warning of the supposed defect, but rather that there was no actionable defect in the design of the armoire and thus no legal duty to warn. To prevail on a claim for failure to warn, the plaintiff must establish "[t]he product was defective." (BAJI No. 9.00.7 ["Failure to Warn — Essential Elements"].) D'Amore did not do so.

True, "[e]ven though a product is flawlessly manufactured and designed, it may be 'defective' if a reasonably foreseeable use involves a substantial danger not readily recognizable by the ordinary consumer, and the manufacturer fails to provide an adequate warning." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1265.)

But substantial evidence supports the jury's conclusion the armoire was not defective for failure to warn because any danger was readily recognizable by the ordinary user. Drexel presented evidence that of the 100,000 guests who stayed at the hotel in 2000, and the countless more since the armoire was installed in 303 rooms in 1993, D'Amore was the only one who reported an injury. And substantial evidence showed an ordinary person would recognize the faux door from the drawers because: (1) the four drawers are separated by four slats, while the door is solid; (2) the door has a visible lock, whereas the drawer-side did not; (3) the door has two knobs that the drawers lack; and (4) the door requires more force to open, distinguishing it from the easily sliding drawers. Additionally, the jury could conclude any danger posed was not substantial, given that the force necessary to open the door, while more than needed to open the drawers, was within the normal range of the force required to open a typical cabinet door. We have no power to reevaluate this evidence on appeal. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th

517, 528 (*Handlery Hotel*).) Substantial evidence supports the verdict in favor of Drexel.

D. Defense Verdict on D'Amore's Negligence Claim Against Ritz-Carlton

D'Amore also challenges the sufficiency of the evidence supporting the jury's special finding Ritz-Carlton was not "negligent in the management of the premises in question." He argues "Ritz-Carlton did not produce any evidence that it warned Appellant, or his fiancé[e], when they checked into the hotel and were assigned Room 732, that a fake door was hidden behind what appeared to them to be four functional drawers on the armoire's lower right side." D'Amore is correct that a possessor of land owes a duty to an invitee to make the property reasonably safe, to warn of latent dangers, and to guard against possible dangers by reasonable inspection of the premises. (See *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20.)

But the jury's finding the armoire was not defective and the uncontradicted evidence that Ritz-Carlton had no notice of prior injuries or other indicia of danger constitute substantial evidence in favor of the judgment. Furthermore, evidence that guests were typically shown personally to their rooms and bellhops pointed out the minibar and that guests were given a separate key to the minibar and instructions as to its location and use, all support an inference these precautions were taken with D'Amore and his fiancé, albeit to no avail. Although Phommarine testified it was not her "practice" to ask for a bellhop to show her to and around a hotel room and that no one informed them of the minibar, we view the evidence in the light most favorable to the verdict. (*Handlery Hotel*, *supra*, 73 Cal.App.4th at p. 528.) D'Amore's attack is without merit.

E. Exclusion of Expert Psychiatric and Psychological Damages Testimony

Curiously, D'Amore raises an issue concerning evidence of damages. He contends the trial court erred by striking his testimony regarding his psychiatric treatment. On direct examination, D'Amore testified that two years after the incident, and only months before trial, he had begun to see both a clinical psychologist and a psychiatrist for emotional problems. D'Amore described medication the psychiatrist had prescribed for depression and anxiety. The defense initially did not object to this line of questioning, but after the morning recess moved to strike all references to D'Amore's psychiatric treatment because these experts were not disclosed before trial. After hearing from both sides, the court granted the motion to strike and admonished the jury to disregard all references to the psychiatric treatment. D'Amore claims, as he did at trial, that this testimony presented only "facts" and did not involve testimony from any expert witness, so pretrial disclosure was not necessary. D'Amore claims prejudice in that the testimony was crucial to the issue of "non-economic damages" because any doubts the jury may have had about the severity of his emotional problems would have been alleviated by its consideration of this evidence. We disagree.

Evidentiary rulings are reviewed for abuse of discretion. (*Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 916.) Even if an abuse of discretion is found, an appellant must show prejudice to create a reversible error. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122.) We find no prejudice to D'Amore could have resulted from the exclusion of this evidence.

D'Amore's claim of prejudice relates only to the extent of his "non-economic damages." Regardless of whether it was error to exclude testimony about D'Amore's psychiatric treatment, the jury's finding for defendants on the liability issue

makes any discussion of damages moot. The jury was instructed to consider the issues of liability and damages separately, and also was required to decide the issue of liability *before* reaching the issue of damages. We presume the jury understood and correctly applied all instructions. (*People v. Yeoman* (2003) 31 Cal.4th at 93, 139.) Thus, any discussion about the extent of damages, and evidence in support of enhanced damages, is necessarily rendered moot by the jury's liability finding. We find no prejudice to D'Amore, and do not consider whether the trial court abused its discretion by disallowing the evidence.

F. Contributory Negligence Instruction

Apart from the evidentiary claims disposed of above, D'Amore raises a single instructional challenge. At the request of both Ritz-Carlton and Drexel, the court instructed the jury using BAJI No. 3.50, defining contributory negligence. D'Amore argues this instruction was given in error because neither defendant produced any evidence at trial that D'Amore was negligent in causing his own injury.

A "party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 572.) But even where an instruction is given in error, the judgment of the trial court will not be reversed unless it results in a "'miscarriage of justice.'" (*Id.* at p. 580.) D'Amore claims prejudice in that the jury may have relied on the contributory negligence instruction to find D'Amore partially at fault for his own injury, and thus reached a "compromise verdict" in favor of the defendants. This is pure speculation, and ignores the plain language of the instruction.

The instruction stated: "Contributory negligence is negligence on the part of a plaintiff which, combining with the negligence of a defendant, contributes as a cause in bringing about the injury. [¶] Contributory negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant but the total amount of damages to which the plaintiff would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the plaintiff." (BAJI No. 3.50.)

We presume the jury is able to understand and follow all instructions given. (*People v. Yeoman, supra,* 31 Cal.4th at p. 139.) BAJI No. 3.50 clearly states that even if the jury were to find D'Amore liable for some portion of his own injury, this finding "does not bar a recovery by the plaintiff against the defendant . . . ." Thus, if the jury believed D'Amore was partially to blame for his own injury, it would have cut his award proportionally. However, this is not what the jury decided. The jury found no liability for either Ritz-Carlton or Drexel. A contributory negligence instruction is relevant only to the extent it lessens the liability of the defendants. Since neither defendant was found liable, the instruction turned out to be superfluous. Because the jury's liability finding precluded any consideration of contributory negligence, we perceive no possible prejudice to D'Amore.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal. (Cal. Rules of Court, rule 27.)

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.